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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 389

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

FILED SEPTEMBER 10, 1929

(34,520)

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[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 389

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, a Corporation, Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, The Chesapeake and Potomac Telephone Company, a body corporate, respectfully represents:

The Decision Below

On June 10, 1929, the Court of Claims entered special amended findings of fact and a conclusion of law, dismissing the petition of The Chesapeake and Potomac Telephone Company, in a suit filed in that Court, No. A-233. The decision of the Court of Claims has not yet been reported. It was concurred in by two of the justices of the Court, while the chief justice filed a dissenting opinion, which was concurred in by the remaining justice.

Summary Statement of the Matter Involved

This claim, which was filed by The Chesapeake and Potomac Telephone Company under the Act of Congress of [fol. 2] March 2, 1919, (40 Stat. 1272), known as the Dent Act, is for the recovery of the difference between the cost of a very large telephone switchboard and of the installation thereof for the War Department during the World War, and the amount realized from the parts when the switchboard was removed.

From June, 1908, to February, 1917, a switchboard with a capacity to 280 lines had been sufficient to supply the War Department. Then, due in part to Mexican border troubles and Germany's declaration of its policy with respect to unrestricted submarine warfare, the telephone needs of the Department began to increase, and larger equipment was then installed, and thereafter increased from time to time. By November, 1917, (war having been declared seven months previously), the officials of the telephone company informed the officials of the War Department that the requirements of the Department would exceed the capacity, then at its maximum, of the type of switchboard then installed, and that it would be necessary to provide a switchboard equipment larger than any previously designed and used for even the largest private branch exchange then existing.

The War Department thereupon erected a building, specially designed and constructed for the purpose of housing such switchboard equipment. The telephone company submitted plans to the Secretary of War for the purpose of securing approval of the proposed switchboard and equipment and its layout in the proposed building with relation to the floor space, before placing a final order for the construction thereof. The endorsements with which these plans were returned to the company indicated approval thereof.

At that time there was in effect a General Supply Contract, made by the Secretary of the Treasury with the telephone company, under authority of the Act of June 17, [fol. 3] 1910, providing for the furnishing of telephone equipment and service to the various Government Departments and Bureaus in Washington, for the fiscal year ending June 30, 1918. This contract provided a rental of $24 per year for a private branch exchange switchboard. Before beginning the installation of the new switchboard in the new building, the telephone company, through its proper official, informed John C. Scofield, Assistant to the Secretary of War and Chief Clerk of the War Department, and Arthur D. Scovell, director of telephones for the War Department, that the telephone company would expect the Government to pay the cost of the new switchboard less salvage.

The new board was expedi-ously and properly installed, and accepted and used by the War Department, beginning in June, 1918. The total cost to the company of the board and its installation was $401,113.34. It was of the type installed in a central-office exchange, and was of sufficient capacity to serve as a telephone exchange for a city of from 40,000 to 100,000 inhabitants. After the armistice the Department ordered portions of the board removed from time to time, the last being removed about the end of 1920. The claim was presented to the Secretary of War for the cost of the board and its installation, less the salvage obtained therefor upon its removal; it was referred by him to the Board of Contract Adjustment, which rejected it, and on appeal to the Secretary of War, the decision of the Board was affirmed. Then suit was filed in the Court of Claims, which, by a court divided three to two, concluded that the telephone company was not entitled to recover, and dismissed its petition.

[fol. 4] The opinion of the Court, while not entirely clear, apparently adopts the position urged by the Government that the telephone company was obligated to furnish and install the switchboard in question, costing it over $400,000, for the rental of $24 per year provided by the General Supply Contract then in force, for the opinion states that the act under which this contract was made gave the Secretary of the Treasury "sole authority to make contracts for supplies for the various departments of the Government, including telephone service", that under the General Supply Contracts in question, "the plaintiff undertook to install and maintain such telephone equipment, at its own risk and expense, as would be required by the various departments of the Government in the District of Columbia, and to furnish service in connection therewith," and that "the department never recognized the claim of an agreement with the plaintiff to pay for the switchboard other than by way of the usual rental provided for in the general supply contract."

The opinion further states: "It is necessary for recovery under the Dent Act that a party making a contract should have authority so to do, and in this case there is a complete absence of proof of authority."

It is not stated, however, whether this conclusion is based

upon the supposed "sole authority" of the Secretary of the Treasury, by General Supply Contracts, to contract for so large and unusual a switchboard for the War Department, or upon the conclusion that Mr. Scofield, who ranked next to the Secretary of War himself in control of the telephone service of the Department, and Mr. Scovell, the director of telephones, were without contractual authority, thus leaving the Secretary of War himself as the only re-[fol. 5] sponsible official.

The opinion of the Court also states that "The findings show no express contract and no facts from which a contract could be implied," and further that "Mr. Scofield, who, if anyone under the Secretary of War, had authority to make such a contract, never stated to plaintiff's representative that the War Department would pay for the installation of or losses on the new switchboard." Yet the findings show clearly the very large and unusual character of the swicthboard necessary to meet the needs of the War Department in the crisis then existing, the notice given Mr. Scofield and Mr. Scovell that the Government would be expected to pay the cost less salvage, approval of the board, and its acceptance and use by the War Department. It seems clear, therefore, that in view of these express findings, the statement in the majority opinion that there are no facts from which a contract can be implied in fact, is based upon the erroneous view that an express promise to pay is essential to such a contract.

Reasons Relied on for the Allowance of the Writ

1. The Court of Claims has construed Section 4 of the Act of June 17, 1910 (36 U. S. Stat. L. 468,531), which gives the Secretary of the Treasury authority to make contracts for supplies for the various Departments of the Government, as conferring upon the Secretary of the Treasury *sole* authority to make a contract for so unusual a switchboard as is here involved, for the use of the War Department, in entire disregard of the following proviso therein:

"*Provided*, That the articles intended to be purchased in this manner are those in *common use* by or suitable to the [fol. 6] *ordinary* needs of *two* or *more* such departments or establishments; but the said Secretary shall have discretion

to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased." (Italics ours.)

It is of great importance that this Federal Statute and the authority thereby conferred, as well the limitations on such authority, should be clearly and correctly construed and defined, not only for the protection of those contracting with the Government, but also for the guidance of the public officials concerned therewith.

2. The Court of Claims has stated in the majority opinion that there was no contractual authority in the officials of the War Department with whom the telephone company dealt, in spite of the fact that the Court found that one of these officials, Mr. Scofield, Assistant to the Secretary of War and Chief Clerk of the War Department, ranked next to the Secretary himself in control of the telephone service, that Mr. Scovell, under appointment by the Secretary of War, was director of telephones for the War Department, having immediate charge of the telephone service and traffic of the Department, and that the War Department did not finally terminate its use of the switchboard until more than a year and a half after the claim for the cost, less salvage, was presented to the Secretary of War and by him referred to the Board of Contract Adjustment.

For a discussion of the contractual authority of the above officials, we respectfully refer the Court to the dissenting opinion of Chief Justice Booth, concurred in by Justice Moss.

If the decision of the Court is correct, then it necessarily follows, either that no one in the War Department had [fol. 7] authority to contract for the new switchboard, which was then vitally necessary for the efficient functioning of the War Department, or that such authority was limited to the Secretary of War in person, at a time when the Secretary was overburdened with the responsibilities placed upon him by the World War. Furthermore it would follow from this decision that the Government may repudiate a contract of its agent while accepting and retaining the benefits thereunder, without even the obligation to pay reasonable compensation therefor.

It is of great importance, both to those contracting with the Government and to Government officials, that, if the conclusion of the Court of Claims be correct, it should be so stated by this Court, or if erroneous, that it should be corrected.

3. The Court of Claims further based its decision upon the ground that no facts were shown from which a contract or agreement could be implied in fact, as distinguished from an agreement implied in law. The findings show, however, the need of the War Department for greatly increased telephone facilities; the statement by the telepohne company to the War Department officials in control and charge of the telephone service that a much larger and specially constructed switchboard was necessary and that, if to be furnished, the Government would have to pay the cost, less salvage; the construction by the Government of a building especially designed for the board and equipment; and approval by the Department of the proposed switchboard and equipment, which were installed by the company and accepted and used by the War Department. Here was an offer by the company and an acceptance by the War Department, which received the benefit thereof. This is all [fol. 8] that is necessary for the implication in fact of a contract and promise to pay.

Again we respectfully refer this Court to the dissenting opinion of Chief Justice Booth.

It is of great importance that so fundamental a principle in the law of implied contracts should not now be questioned or disturbed.

Furthermore it is of great importance that those who deal with our Government, especially in such a crisis as that existing during the World War, should have a reasonable expectation of receiving just compensation for the benefits furnished to and received by the Government and should not be defeated in this expectation by mere informalities in transactions conducted in a time of such urgency and stress. Nor should the Government be allowed to disavow the burdens while retaining the benefits of an agreement because of its informal character.

While the majority opinion correctly states abstract principles of law with respect to recovery under the Dent Act, yet those principles were not properly applied by the court

in this case, and the court should have given a recovery under that Act or awarded reasonable compensation irrespective thereof.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Claims, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. A-233, The Chesapeake and Potomac Telephone Company, a corporation, vs. the United [fol. 9] States, and that the said judgment of the Court of Claims may be reversed by this Honorable Court, and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

The Chesapeake and Potomac Telephone Company, by Stanton C. Peelle, C. F. R. Ogilby, Paul E. Lesh, Dale D. Drain, Jerome F Barnard, Counsel for Petitioner.

[fol. 1] In Court of Claims of the United States

No. A-233

The Chesapeake and Potomac Telephone Company, a Corporation,

vs.

The United States

1. History of Proceedings

On July 21, 1921, the plaintiff filed its original petition.

On September 20, 1921, the defendant filed a general traverse to said petition.

On August 18, 1925, by leave of court, the plaintiff filed its amended petition.

Said amended petition is as follows:

II. Amended Petition—Filed August 18, 1925

To the Honorable the Justices of the Court of Claims of the United States:

The claimant, The Chesapeake and Potomac Telephone Company, respectfully represents:

1. The claimant is a corporation, duly created, organized and existing under and by virtue of the laws of the State of New York, and having and maintaining offices, and conducting its business as a telephone company, in the District of Columbia; and, at all times hereinafter mentioned was, and still is, so engaged in the conduct of its business, and in the place mentioned.

[fol. 2] 2. This claim is made under the provisions of the Act of Congress, approved March 2, 1919, entitled:

"An Act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes."

3. Prior to the recent war, and at the time thereof, there was installed and in use in the State, War and Navy building a telephone exchange, and the latter was enlarged, from time to time, to meet the constantly increasing needs of that service, until the point was reached where further expansion was impossible, except only by securing additional housing facilities. Thereupon, and as a result of the necessities of the situation mentioned, there was erected, by and on behalf of the United States, a building known as No. 1723 "F" Street, N. W., Washington, D. C., for the purpose of accommodating the installation of a telephone switchboard, and associated equipment, of sufficient size and capacity to meet the needs and requirements of the Government incident to the state of war in which it was then involved and engaged.

4. And claimant further shows that, thereupon, and in or about the month of December, 1917, the defendant, acting therein by and through its duly authorized officers and agents in that behalf, requested plaintiff to install and erect, in the certain building above mentioned, a telephone switchboard, with associated equipment, said switchboard to be of size and capacity to accommodate twenty-five (25)

sections, having three (3) positions as to each; and faithfully undertook, promised and agreed to reimburse and pay claimant the reasonable cost thereof and of its installation and subsequent removal.

[fol. 3] 5. And claimant says that, being so thereunto requested, as hereinaforesaid, it thereupon purchased what is known as a Special No. 1, 92 Jack telephone switchboard, having twenty-five (25) sections of three (3) positions each, arranged with automatic flashing recall, and equipped for 7,200 extension lines, 180 outgoing trunks, 160 tie lines, and 30 private toll lines, together with frames, rack, cabling, power plant, desks and miscellaneous apparatus; the same being, at that time, the largest telephone switchboard of special or private installation in the world; and that, in and about the purchase and installation thereof, the claimant reasonably expended the sum of, to wit, Four Hundred and One Thousand, One Hundred and Thirteen Dollars and Thirty-four Cents ($401,113.34).

6. Claimant further shows that the above switchboard and equipment were installed and put in service, to the extent of some forty-five (45) positions, on or about July 1, 1918, and the remaining positions in or about the month of September, 1918.

7. Claimant further states that, after the signing of the armistice, and from time to time, certain of the sections comprising the switchboard aforesaid were successively ordered by the defendant to be discontinued, some ten (10) of the sections having been so ordered to be discontinued prior to February 20, 1919, and, thereafter, during the year 1920, all of the remaining sections were so ordered to be discontinued.

8. Claimant further states that, in order to keep down the loss and damage, as far as reasonably might be, incident to the purchase and installation of the switchboard and equipment aforesaid, and incident to the removal [fol. 4] thereof, as so directed and ordered by the defendant, as aforesaid, it made sale of so much and such parts of said switchboard and equipment as it was found possible to sell at reasonable and proper prices; that the amount

realized from such sales, less the reasonable cost of the removal of the switchboard and equipment, amounted to the sum of Two Hundred and Six Thousand, Three Hundred and Fifteen Dollars and Seventy-nine Cents, ($206,315.79), with which amount claimant credits defendant, upon the aforesaid expenditure by claimant of Four Hundred and One Thousand, One Hundred and Thirteen Dollars and Thirty-four Cents, ($401,113.34). Claimant further credits defendant upon said expenditure with the following items, namely: The sum of Twenty-two Thousand, Two Hundred and Thirty-two Dollars and Seventy-eight Cents, ($22,232.78), the amount of depreciation on said switchboard and eqipment allowed and paid by defendant to claimant during the period of the Government's control of claimant's telephone system, and the sum of One Thousand, Six Hundred and Eighty-two Dollars and Ninety-seven Cents, $1,682.97), the amount paid by defendant to claimant as revenue for the use of said switchboard and the multiple jacks connected therewith during the time the same were in use by defendant. The three credits aforesaid aggregate the sum of Two Hundred and Thirty Thousand, Two Hundred and Thirty-one Dollars and Fifty-four Cents, ($230,231.54), which, deducted from the aforesaid sum of Four Hundred and One Thousand, One Hundred and Thirteen Dollars and Thirty-four Cents ($401,113.34), leaves a net loss sustained by claimant, incident to the aforesaid transaction, of One Hundred and Seventy Thousand, Eight Hundred and Eighty-one Dollars and Eighty Cents, ($170,881.80).

[fol. 5] 9. Claimant further states that, in accordance with the provisions of the certain Act of Congress, hereinabove referred to, and within the time therein prescribed, it submitted its application and claim for reimbursement to the Secretary of War, and that such proceedings were had therein as that the said Secretary failed to offer any adjustment or payment of compensation which claimant was willing to accept, and failed and refused to offer any adjustment, payment or compensation, and rejected and denied the claim of plaintiff in its entirety.

10. The claimant is the sole owner of the claim embraced herein, and no other person or concern has any interest

therein. No assignment or transfer of said claim, or of any part thereof or interest therein, has been made, and no action, other than as herein aforesaid, has been had on this claim in Congress, or in any of the Departments of the Government of the United States; the claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not, in any way, voluntarily aided, abetted or given encouragement to rebellion against said Government; and, finally, claimant alleges that it is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets.

Wherefore, the premises considered, the claimant prays judgment against the United States in the sum of One [fol. 6] Hundred and Seventy Thousand, Eight Hundred and Eighty-one Dollars and Eighty Cents ($170,881.80).

The Chesapeake and Potomac Telephone Company, by A. E. Berry, President. Attest: John F. Slaven, Asst. Secretary. (Seal.) Peelle & Ogilby, Attorneys for Claimant.

Duly sworn to by A. E. Berry. Jurat omitted in printing.

[fol. 7] III. General Traverse—Filed Oct. 17, 1925

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

IV. Further Proceedings Had in Case

On December 7 and 8, 1927, this case was argued and submitted on merits by Mr. Stanton C. Peelle, for plaintiff, and by Mr. Heber H. Rice, for defendant.

On February 20, 1928, the court filed findings of fact, conclusion of law, dismissing petition, with opinion by

Graham, J., and dissenting opinion by Booth, J. Judgment was entered against plaintiff in the sum of $1,129.97, for printing the record in this court.

On April 20, 1928, the plaintiff filed a motion for a new trial.

On October 8 and 9, 1928, said motion was argued and submitted by Mr. Stanton C. Peelle, for plaintiff, and by Messrs. J. J. Lenihan and H. H. Rice, for defendant.

On June 10, 1929, the court entered the following order on said motion:

Order

It is ordered this 10th day of June, 1929, that the plaintiff's motion for new trial be and the same is overruled.

The former findings are vacated, set aside and withdrawn, and amended findings are this day filed, the judg- [fol. 8] ment and opinion to stand, with a dissenting opinion by Chief Justice Booth now filed, in which Judge Moss concurs.

By the Court.

V. **Amended Special Findings of Fact, Conclusion of Law, Opinion of the Court by Graham, J., and Dissenting Opinion by Booth, Ch. J.**—Filed June 10, 1929

This case having been heard by the Court of Claims upon the report of a commissioner and the evidence, the court makes the following

AMENDED SPECIAL FINDINGS OF FACT

I

The Chesapeake and Potomac Telephone Company, plaintiff, is a corporation organized and existing under the laws of the State of New York, maintaining its offices and conducting its business as a telephone company in the District of Columbia, and at all times hereinafter mentioned was, and now is, so engaged in the conduct of said business in the District of Columbia.

II

On June 23, 1916, plaintiff entered into a contract, known as the General Supply Committee contract, with the Secretary of the Treasury, who was exclusively authorized by law to make such contracts (Section 4, act of June 17, 1910, 36 Stat. 468, 531), which provided for the telephone service to be furnished by plaintiff to the various departments, offices, and establishments of the Government in the District of Columbia, for the fiscal year ending June 30, 1917. On May 18, 1917, the same parties entered into a similar contract providing for like telephone service for the fiscal year ending June 30, 1918. The chief revenue received by plaintiff from the War Department under the annual General Supply Committee contracts consisted in mileage charge upon station lines, charges for telephone stations, and local messages. Plaintiff furnished the necessary private branch exchange switchboards at a nominal rental of $24 per annum, it being the policy of the plaintiff to charge merely a nominal rental for such equipment, while the chief revenue was being derived from other sources. The Government at all times paid the wages of the operators at the War Department switchboard.

[fol. 9] III

In the renewal of the General Supply Committee contracts for the year beginning July 1, 1917, the following provisions were contained:

"For and in consideration of the payments to be made as hereinafter provided for, the party of the first part (C. & P. Telephone Company) does hereby covenant and agree to and with the party of the second part (Secretary of the Treasury of the United States) that said party of the first part will, at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia, for a term of one year beginning July 1, 1917, and ending June 30, 1918, at the following rates:

"Item 20000.—That said company will install, equip, and maintain such telephone equipment as may be required in the District of Columbia, and furnish service in connection

therewith at the following rates during the fiscal year 1918:

"(a) Common battery private branch exchange switchboards, including one operators set, of telephones for each operator's position, each, per annum, $24.00.

"Item 20200.—At the request of the department the company will change the location of switchboards or telephone stations of a No. 2 private branch exchange system, charging the department therefor the cost of material, labor, transportation of employees, and supervision. Any changes in the location of switchboards which the company may make for its own convenience or in the renewal of equipment will be done without cost to the department.

"Item 20350.—Should additional service or equipment be required by any of the departments or establishments of the Government such additional service or equipment will be furnished at the rates named herein. Should any of the departments or other establishments of the Government discontinue the use of any equipment or service, a like reduction will be made from the date such equipment is discontinued, provided the company is given not less than 10 days' notice of the purpose to discontinue."

The above provisions were the same as the corresponding provisions in the General Supply contract for the previous year ending June 30, 1917.

IV

On September 25, 1918, the Secretary of the Treasury entered into a contract with plaintiff, prepared by the General Supply Committee, for telephone service for the fiscal year beginning July 1, 1918, which contained, among other things, the following provisions:

"The company does hereby covenant and agree to and with the subscriber that the company will, at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia for a term of one year beginning July 1, 1918, and ending June 30, 1919, at the following rates:

"The company will install, equip, and maintain such telephone equipment as may be required by the subscriber in

[fol. 10] the District of Columbia, and furnish service in connection therewith at the annual rates indicated opposite each item during the fiscal year ending June 30, 1919: * * *

"Item 20000.—Private branch exchange system:

(a) Switchboards:

(1) Common battery private branch exchange switchboards, including one operator's set of telephones for each operator's position, limited to twenty station drops $24.00

(2) For subswitchboards furnished in connection with private branch exchange service in the same building or on the same Government reservation with the main switchboard for use in providing night service, etc., with 1 operator's set of telephones for each operator's position, viz—

(aa) Cordless switchboard with a capacity of 3 trunk lines and 7 stations, with operator's set 24.00

(bb) Cord switchboard with a capacity of 10 trunk lines and 30 stations equipped with 20 station drops, with operator's set 24.00

(b) Telephone stations, includes interior wiring to connect stations with private branch exchange switchboards or subswitchboards, except when the installation is exceptionally expensive, due to unusual conditions, such as reinforced concrete buildings, etc., or when the system is not likely to be reasonably permanent, in which cases an installation charge will be made:

(1) For first 10 telephone stations, each .. 6.00

(2) For second 10 telephone stations, each 4.80

(3) For telephone stations in excess of 20, each 3.60

(4) For station terminal equipment at the private branch exchange switchboard, in excess of 20 drops, each 1.20

"Should additional service or equipment be required by any of the departments or other establishments of the Government such additional service shall be furnished at the rates named herein, or at the rates in effect at the time such additional service or equipment is provided.

"Should the subscriber desire any other service or equipment not specified herein, the company's rates and regulations filed with the Public Utilities Commission of the District of Columbia will apply.

"Should any of the departments or other establishments of the Government discontinue the use of any equipment or service within the period of one month from the date of its installation, the minimum charge for such equipment or service shall be for the period of one month at the rates applicable thereto.

"The Secretary of the Treasury, by accepting rates and terms herein stated on behalf of the subscriber, agrees that the equipment now in service is covered by this contract."

V

Under the authority of the act of March 4, 1913, the Public Utilities Commission, thereby created, adopted schedules of rates to be charged for telephone service and equipment in the District of Columbia, thereafter modifying certain of said rates from time to time, as the commission deemed proper. The annual charge for a private branch exchange switchboard, including operator's set of telephones, was fixed by the aforesaid commission at $24 throughout the period involved in this claim.

Sheet No. 4, Tariff No. 22, in force from June 1, 1916, to June 30, 1923, provided:

[fol. 11] "Rates for Equipment not Otherwise Provided for

"When a subscriber desires a type of equipment for which provision is not otherwise made, a rate will be quoted based on the initial cost of such equipment, the installation charge, and the estimated cost of maintenance."

There was also in effect from February 1, 1916, to June 30, 1923, a tariff or rate schedule of the commission which provided, in reference to private branch exchange systems:

"When the installation is exceptionally expensive, due to unusual conditions, such as reinforced-concrete buildings, etc., or when the system is not likely to be reasonably permanent, an installation charge is made."

VI

In June, 1908, plaintiff had installed a special three-position multiple private branch exchange No. 4 switchboard for the War Department, in room 245 of the State, War, and Navy Building at Washington, D. C. Said switchboard was equipped for 280 lines, 20 trunks, and 30 tie lines; and when it was installed, about 180 lines were put into service. In February, 1917, the number of lines had not increased to more than 257, and this private branch exchange switchboard had continued to be sufficient to supply the War Department with telephone service from June, 1908, to February, 1917.

VII

Due in part to the Mexican border troubles and more especially following the announcement by the German Government on January 31, 1917, of its policy with respect to unrestricted submarine warfare and the necessary pre-war activities of the United States Government that followed this announcement, the telephone service handled through this switchboard continued to increase in such proportion that additional switchboard equipment was required. To meet this demand for increased facilities a five-position multiple No. 4 private branch exchange switchboard was installed for the War Department in the same room and put into service on March 23, 1917, replacing the three-position switchboard theretofore in service.

VIII

The requirements of the War Department for telephone service continued to increase rapidly, so that in August, 1917, it was necessary to install four additional positions of multiple No. 4 private branch exchange switchboard, making a total of nine positions. Before these four additional positions were installed, however, it became evident

to the plaintiff that the War Department's need for telephone service would exceed the capacity of the No. 4 multiple type of private branch exchange equipment, and accordingly plaintiff ordered a private branch exchange equipment of the No. 604 type, the largest and most modern type of private branch exchange equipment then on the market. The initial installation of this No. 604 type priv-
[fol. 12] ate branch exchange equipment consisting of 12 operators' positions, with equipment for 1,000 lines, was installed in rooms 241 and 243 in the State, War, and Navy Building and placed in service on October 1, 1917, replacing the nine positions of No. 4 switchboard in room 245.

IX

The War Department's requirements for telephone service continued to grow, and accordingly additions were made to the No. 604 private branch exchange equipment, so that by November 1, 1917, it had been increased to 15 operators' positions, with equipment for 1,300 lines; by December 15, 1917, to 18 operators' positions and 1,600 lines; and by January 9, 1918, to 20 operators' positions and 2,000 lines, the normal capacity of the equipment. It then became necessary to crowd additional equipment into the switchboard until the lines had been increased to 2,400 with a corresponding increase of operators' positions, and then to resort to the expedient of providing other operators' positions for local trunking, thus making it necessary for a large proportion of the local calls to be handled by two operators, which resulted in increased cost of operation to the Government, and in a less speedy and less accurate service. By such changes, this No. 604 type of private branch exchange equipment was expanded during the winter and spring of 1918 until it consisted of 42 operators' positions, including trunking positions, with equipment for 4,200 lines, thus making it a highly specialized private branch exchange switchboard. This was practically the limit to which this equipment could be expanded.

X

By November, 1917, the officers of the plaintiff company foresaw that, due to war conditions, the requirements of the

War Department for telephone service were going to exceed the line capacity of the No. 604 private branch exchange equipment, and that it would be necessary to provide a switchboard equipment larger than that previously designed and used for the largest private branch exchange then existing.

XI

Plaintiff informed the officials of the War Department of this and of the floor space which would be required for such equipment, and for furnishing adequate telephone facilities for the department; but as no such space was then available, the Secretary of War appointed a committee to consider the space question. As a result, the War Department erected a separate building at No. 1723 F Street N. W. to house the new equipment. The building was designed by an architect employed by the Government, the floor plans for which were submitted by plaintiff. The building was erected by a contractor employed by the Government. The Government paid for the erection of the building to the extent of $130,000, the plaintiff contributing the balance of about $8,000 to avoid any impairment in the construction. [fol. 13] Plaintiff had always theretofore provided at its own expense the necessary telephone switchboards and equipment for use at the War Department, and the defendant had always provided the necessary space for such switchboards and equipment.

XII

Honorable Newton D. Baker was Secretary of War at that time, and John C. Scofield was assistant to the Secretary of War and chief clerk of the War Department. Mr. Scofield, in addition to his other duties, had supervisory charge with regard to civilian employees and assigning buildings and getting space for different activities; he also had supervisory charge of the estimates and expenditures from the appropriation "Contingent expenses of the War Department." At the beginning of the war he had supervision of the telegraph and telephone division, and ranked next to the Secretary of War in control of said service, and on December 18, 1917, Arthur D. Scovell, who had much ex-

perience as a traffic manager of the New York Telephone Company, which, together with plaintiff, were constituent member of the Bell system, was appointed by the Secretary of War and assumed his duties as director of telephones for the War Department, having immediate charge of the telephone service and traffic of the department. He had administrative power inside the War Department, could make recommendations, had charge of the telephone employees, could switch them around and tell how to make their service effective, but had no power to bind the Government in the matter of contract and was not in any sense a contracting officer. Mr. Scovell was there to get the best service as quickly as possible, and the Secretary of War supported him in that. There were items of work or installations which were ordered for the telephone service of the War Department by Mr. Scovell while he was director of telephones, without any written order given at the time, but payments for which were subsequently made. Mr. Scovell was in immedate charge of the telephone service of the War Department, and this service was under the general direction of Mr. Scofield.

About the time of the beginning of the World War, plaintiff, anticipating an abnormal increase in the telephone business at the War Department called its engineers together and planned to handle the prospective increase in business. Soon thereafter plaintiff asked the War Department for additional space in which to install telephone facilities. Plaintiff also secured said A. D. Scovell for the War Department, to become the Government's "dollar-a-year" man, in connection with the War Department's telephone service. His salary, aside from said dollar a year, was paid by plaintiff or its associate, the New York Telephone Company, throughout his tenure of service from December 18, 1917, to November 14, 1918. Plaintiff had representatives from different American Telephone & Telegraph companies on hand in Washington to lend their assistance in co-operating with plaintiff and to assist plaintiff in procuring the switchboards and equipment. The said American Telephone & Telegraph companies considered the problem of increased telephone service at the War Department to be largely its own problem.

[fol. 14] XIII

When, in November, 1917, the officials of the plaintiff foresaw the necessity of installing a larger type of switchboard if adequate telephone service was to be furnished to the War Department these officials conferred with Mr. Scofield and Mr. Scovell and also with the committee referred to in Finding XI as to the space and character of building which would be required to house it properly. The War Department decided to erect a separate building for the purpose, and plaintiff's officials cooperated with the War Department in the preparation of the plans for such building. As it was vital that the new telephone service should be provided at the earliest possible moment, plaintiff, as soon as the type of Switchboard was tentatively determined upon, on or about December 27, 1917, ordered the manufacture of the stock parts for the exchange, such as multiple jacks and the like, which had to be made up by the thousands, but not such parts as might have to be changed or the order for which could not be canceled, if such tentative plans for such new switchboard were abandoned. [Plaintiff also prepared blue prints showing the proposed floor plans and the location thereon to scale of the various parts of the proposed switchboard. These blue prints indicated the extensive character of the various parts of the equipment.]

Mr. Charles T. Clagett, who was plaintiff's district manager at the time, had charge of its business office, looked after collections, the ordering of telephones, and all business pertaining to the public, including the Government's contractual relations with the plaintiff, consulted with plaintiff's chief engineer, Mr. C. F. Sherwood, who had been sent down from the New York Telephone Company to take charge of the Government situation and to whom Mr. Mr. Clagett reported, and told him the whole installation ought to be held up until they got a written order. Mr. Sherwood objected to such a course, told Mr. Clagett that they wanted to do everything possible for the Government, and would take their chances of getting paid, and notified Mr. Clagett to go ahead with the installation. In January, 1918, plaintiff advised Mr. Scofield, and prior to installing the same gave a similar notice to Mr. Scovell, that it expected the Government to pay the cost of the new switch-

board less salvage, but neither the Secretary of War nor Mr. Scofield at any time approved payment of the same.

The proposed central-office type of switchboard and equipment were approved orally by Mr. Scovell, who considered it the best to be had and the only switchboard and equipment which would meet adequately the needs of the War Department. In addition, plaintiff submitted to the Secretary of War blue prints showing, on the floor plans of the building which the Government proposed to erect, the switchboard and equipment, and location thereof, which plaintiff proposed to install therein. Plaintiff's letter of transmittal, addressed to the Secretary of War under date of December 31, 1917, said, in part:

"We will appreciate hearing from you at your earliest convenience, since in order to save time, we are having the factory proceed with the manufacture of the new War Department switchboard in accordance with the accom-
[fol. 15] panying layout, and should any changes therefrom be desired, the factory should be informed at once."

On January 2, 1918, this letter was referred by Mr. Scofield to the cantonment division for consideration and report. The cantonment division, with the indorsement, "So far as can be determined, the arrangement as suggested by the telephone company is satisfactory," referred the same to Major Starrett, who, under date of January 14, 1918, wrote returnig the plans to plaintiff, with said indorsements, and saying, "To me the indorsements already made seem sufficient authorization for you to proceed." Thereupon plaintiff gave final orders for the completion of the proposed switchboard and equipment. These plans were submitted by plaintiff to the Secretary of War not only for the purpose of learning definitely the floor plans of the proposed building, but also for the purpose of securing approval of the proposed switchboard and equipment.

XIV

Plaintiff installed the new No. 1 switchboard and equipment in said new building, and transferred the telephone service from the old switchboard in the State, War, and Navy Building to the new switchboard in the new building,

completing the installation and putting the new board into service on June 22, 1918. The new switchboard consisted of fifteen sections of three positions each, or forty-five operator's positions, serving about five thousand extension lines, 180 central office trunks, 140 tie lines, and 30 toll lines. By the time of the armistice, plaintiff had installed 30 additional operator's positions, with associated equipment.

An extension line is a line from a private branch exchange switchboard to one or more stations or telephones. A trunk line connects the central office with a private branch exchange, a tie line connects two private branch exchanges.

The new switchboard was larger, more costly, and had a much larger capacity than an ordinary private branch exchange switchboard. It was of the type installed in a central-office exchange. The board installed served 65 different buildings in the District of Columbia, located in various localities, where the War Department was housed.

It had a complete power plant of its own and was of sufficient capacity to serve as a telephone exchange for a city of from 40,000 to 100,000 inhabitants. It was connected by direct tie lines with the switchboards of nearly all other Government departments, and also directly with points outside Washington, some as far away as Ohio, thus putting the department in direct communication, without going through the central office exchange, with all these points mentioned.

XV

After the signing of the armistice the War Department's need for telephones decreased and beginning in the early part of 1919, upon the several orders of the War Department therefor, the plaintiff from time to time removed various sections of the new switchboard, until about the first of January, 1921, it was completely removed. Service for the War Department, upon discontinuance of service at 1723 F Street N. W., was, by order of the War Department, furnished through the Navy Department switchboard.

[fol. 16] XVI

In transferring the telephone service to the new building, plaintiff, on December 3, 1918, submitted to the War Department a bill for $35,917.05 net, stating that it covered

the cost of the labor and material involved in accordance with the provisions of the General Supply Committee contract. This bill was paid by the War Department on December 13, 1918.

Plaintiff presented and collected its bills for rental upon both the old switchboard and the new switchboard at the same nominal rental of $24 per year for the switchboard proper, and increased rates for the lines and stations in the General Supply contract. An additional charge against the switchboard for multiple jacks was made, amounting to $10,153.56, and was paid to plaintiff by the War Department.

XVII

The new switchboard was larger and of a different type from the old switchboard (and the same may be said of all preceding switchboards), the purposes for which they were used were identical, being used as a private branch exchange switchboard. As to size, both were described as the largest private branch exchange switchboard in the United States. The cost of the new board exceeded the cost of the old board by about twenty-five per cent per position. Such features of the new switchboard as the power plant, batteries, dynamos, generators, and "A" and "B" boards, were also used in the old No. 604 switchboard in the State, War, and Navy Building. These boards possessed the same general features and were both common battery private branch exchange switchboards.

XVIII

Plaintiff was paid special increases in rates in accord with the rates fixed by the Public Utilities Commission of the District of Columbia, for telephone service from the Government for its general supply contract for the fiscal year beginning July 1, 1918, which rates were continued during subsequent years. The revenue derived by plaintiff from new items inserted in said contract after the installation of the new switchboard and covering the period from July 1, 1918, to November 10, 1920 (during which time the new switchboard was in service), was ($52,224 and the extra revenue derived from the 16⅔ per cent increase in the old mileage rates was $46,264, making a total of $98,488 for a period of less than 2½ years.

XIX

Plaintiff collected from the Government under the Government control agreement for the full year of such Government control ending July 31, 1919, an estimated annual carrying charge of 24.6 per cent of the book value of the switchboard, amounting to $78,939, less the nominal rentals actually received.

[fol. 17] XX

The War Department did not recognize the claim of an agreement with plaintiff to pay for the switchboard other than by way of the usual rental provided for in the General Supply Committee contract.

Mr. Scofield never represented to plaintiff's representatives that the War Department would pay for the installation or costs of or losses on the new switchboard, nor did he prior to installation notify the plaintiff that he would not pay for same. Secretary of War Baker made no agreement with plaintiff to pay for the switchboard, never personally authorized such payment, never heard it suggested, and did not know until after the armistice that plaintiff contemplated submitting claim for the same.

XXI

At the close of the war the American Telephone & Telegraph Company contributed to the losses sustained by plaintiff on its telephone equipment installed for use in the Government service during the war, but soon thereafter discontinued, including, including the new switchboard in question. The American Telephone & Telegraph Company contributed $1,250,000 on December 31, 1919, to cover such losses, being set out in the minutes of its executive board meeting of December 17, 1919, and containing the following language:

"Whereas the Chesapeake & Potomac Telephone Company, one of said associated companies, whose plant is located largely within the District of Columbia, was compelled in order to meet the late war emergency to make large and extraordinary expenditures on account of plant

that would not have been otherwise necessary at this time or in the immediate future;

"And whereas, the necessity for such large and extraordinary expenditures arose out of the requirements of the telephone service of the entire Bell system, and not solely out of the requirements of the telephone service of the Chesapeake & Potomac Telephone Company;

"And whereas, upon the termination of such war emergency, no further necessity exists for much of the plant so acquired by the Chesapeake & Potomac Telephone Company, and it can not be presently utilized within its territory, so that the transaction involved a considerable loss to said telephone company;

"And whereas, equity requires that said loss, which was incurred in behalf of the entire Bell system, be not imposed wholly upon said Chesapeake & Potomac Telephone Company.

"Resolved, That this company participate to the extent of $1,250,000 in the loss so incurred * * *."

Such action was taken by said American Telephone & Telegraph Company while plaintiff's claim on account of said switchboard was pending before the Board of Contract Adjustment of the War Department.

XXII

The sum of $312,000 of said payments was so contributed to cover telephone equipment or plant which was under way at the time of the armistice, and which was soon thereafter abandoned. The remaining $938,000 was con- [fol. 18] tributed to cover the ultimate net loss on plant which had been put into service prior to the armistice, but which plaintiff had planned to retire at a later date, the gross book value of which amounted to $1,849,929.14.

XXIII

While the said $1,849,929.14 represented the gross book value of the latter class of telephone plant, the actual net losses thereon amounted to less than $900,000, so that the sum of $938,000 set apart to cover such losses was more than ample to cover the actual losses on that equipment, among which items was listed the War Department's

switchboard at $328,166.56, designated as "P. B. X., Case No. 20, War Department."

XXIV

The following revenue was received from the War Department during the period of service of the new switchboard, by the Bell system, of which the American Telephone & Telegraph Company was the parent concern:

The total long-distance telephone tolls for calls emanating from the War Department amounted to $482,124.00, and the incoming long-distance calls and tolls were about equal to the outgoing calls and tolls, making a total of incoming and outgoing tolls of approximately $946,248.00, the bulk of which represents the long-distance revenue received by the Bell system through the instrumentality of the new switchboard, aside from the leased line rentals of $141,812.53 paid to the American Telephone & Telegraph Company by the War Department. Plaintiff received about 30 per cent of the gross amount of outgoing long-distance tolls, which would be $144,637.20. The remainder of the $946,248.00 plus $141,812.53, to wit, $943,423.33, was received by the American Telephone & Telegraph Company and its other subsidiaries of the Bell system, and other lines.

XXV

The gross revenue, exclusive of long-distance tolls, received by plaintiff from the War Department for telephone service under the General Supply contracts for the fiscal year beginning July 1, 1916, and ending June 30, 1917, was $5,714.77; July 1, 1917-June 30, 1918, $85,809.41; and July 1, 1918-June 30, 1919, $338,824.60. In addition there was paid to plaintiff by the War Department the sum of $35,917.05, mentioned in Finding XVI, supra.

The gross revenue under the said contracts from the same source for the period the new switchboard was in service, June, 1918, to November, 1920, was $534,418.83.

XXVI

The Government was in control of the telephones of the United States for the period of one year ending July 31,

1919, under the contract between the Postmaster General and the American Telephone & Telegraph Company, and its subsidiaries, including the plaintiff herein. By this contract the Government was to and did reimburse these com- [fol. 19] panies for the use of their plants and equipment to an amount over and above all expenses assignable to operation and maintenance, licensing revenue, and also depreciation, at the average rate of return on the stock for the three preceding years.

XXVII

In the final settlement under this contract the Government paid the American Telephone & Telegraph Company and its subsidiaries $9,290,170.31. The portion thereof received by plaintiff in this settlement was $1,322,205.64, including 8% return on its stock for period of Government control, August 1, 1918, to July 31, 1919.

XXVIII

On May 19, 1919, plaintiff rendered the War Department a claim based upon the proportionate cost and estimated salvage of the thirty positions which had then been ordered removed. Thereafter, as fast as further positions were ordered removed and more accurate statements could be prepared, the claim was amended. The Secretary of War immediately referred the claim to the Board of Contract Adjustment, which held hearings thereon, on June 25, 1920, disallowed the claim in its entirety, and on July 20, 1920, denied an application for rehearing. An appeal was taken to the Secretary of War, who, on November 9, 1920, affirmed the decision of the board.

XXIX

The total cost to plaintiff of the new switchboard at 1723 F. St. N. W., and the associated equipment and of the installation thereof was $401,113.34. This amount does not include cost of additional telephones, nor cost of miles of wiring to afford operation.

The amount realized by the plaintiff as salvage for said switchboard and equipment, less the cost of removing same,

was $206,315.79. For depreciation upon such of said switchboard and equipment as was in use by the War Department during the period of Federal control, August 1, 1918, to July 31, 1919, the Government paid plaintiff the sum of $22,232.78, and as 8 per cent return on the investment in said switchboard and equipment for that period, $25,671.00, a total of $47,903.78. For the entire period that said switchboard and equipment, or a part thereof, were in use by the War Department, the War Department paid plaintiff for the use of switchboard and multiple jacks connected therewith the sum of $11,202.20.

After deducting from the said cost the aforesaid items of salvage, depreciation, 8 per cent return, and rental, which aggregate $265,421.77, the net loss amounts to $135,691.57.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and that its petition should be, and it is hereby, dismissed.

[fol. 20] Judgment is rendered against plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the clerk and collected by him.

Opinion

Graham, Judge, delivered the opinion of the court:

The facts of this case are fully set out in the findings and it is not necessary to recite them. Nor is it necessary to discuss the question of the plaintiff's right to recover under the telephone service contract hereafter mentioned, as the suit is not based upon that contract, and, if it were, it is too clear for discussion that there is no provision therein under which a recovery for the claim set up in this suit could be allowed.

The plaintiff is suing, as stated in its petition and brief, to recover under the act of Congress of March 2, 1919, 40 Stat. 1272, known as the Dent Act, for the difference between the cost of installation of a switchboard for use of the War Department and the value of what it realized from

the parts when the switchboard was removed. The reference to the act in the petition as the statute relied upon is in compliance with a rule of this court.

The switchboard was installed during the first half of 1918 and was completed on June 22, 1918. The claim here sued upon was presented to the Secretary of War, who referred it to the Board of Contract Adjustment, which rejected it, and on appeal to the Secretary of War the decision of the board was affirmed. Thereupon suit was brought in this court.

By section 4 of the act of June 17, 1910, 36 Stat. 468, 531, the Secretary of the Treasury was given sole authority to make contracts for supplies for the various departments of the Government, including telephone service. In the exercise of that power, on June 23, 1916, he entered into a contract with the plaintiff to provide telephone service for the various departments of the Government in the District of Columbia for the fiscal year ending June 30, 1917; and on May 18, 1917, a similar contract was entered into for the year ending June 30, 1918. During the period from August 1, 1918, to July 31, 1919, the Postmaster General was in control, under authority from the President, of telephone service. Under each of these contracts the plaintiff undertook to install and maintain such telephone equipment, at its own risk and expense, as would be required by the various departments of the Government in the District of Columbia, and to furnish service in connection therewith.

The original switchboard installed by plaintiff in June, 1908, was a three-position multiple private branch exchange No. 4 switchboard; on March 23, 1917, this was increased to five positions; in August, 1917, there was an increase to nine positions; on October 1, 1917, to twelve positions: and in November, 1917, came the first suggestion with regard to the switchboard out of which this controversy arose. These several increases were made by the plaintiff without claim upon the department for furnishing the facilities necessary to meet the increased business.

It is equally clear from the facts found that the Secretary of War made no agreement with the plaintiff to pay for the switchboard, never authorized such payment, never heard it suggested, and did not know that the plaintiff con- [fol. 21] templated submitting a claim for the same until

after the armistice. Mr. Scofield, who, if anyone under the Secretary of War, had authority to make such a contract, never stated to plaintiff's representative that the War Department would pay for the installation of or losses on the new switchboard, and the department never recognized the claim of an agreement with the plaintiff to pay for the switchboard other than by way of the usual rental provided for in the general supply contract.

It is necessary for recovery under the Dent Act that a party making a contract should have authority so to do, and in this case there is a complete absence of proof of authority. The purpose of the Dent Act was to give a remedy upon contracts irregularly made, not upon contracts without authority. Jacob Reed's Sons v. United States, 273 U. S. 200, 202; Baltimore & Ohio Railroad Co. v. United States, 261 U. S. 592, 596.

The findings show no express contract and no facts from which a contract could be implied. The contract required by the Dent Act must be a contract in fact or an agreement implied in fact, as distinguished from an agreement implied in law. Baltimore & Ohio R. R. Co. case, supra.

The petition should be dismissed, and it is so ordered.

Sinnott, Judge, and Green, Judge, concur.

DISSENTING OPINION

Chief Justice BOOTH dissenting:

This is a suit to recover the cost, less salvage value, of a central-office type of switchboard installed under contract to pay therefor, by the plaintiff in a building of the War Department. The cause of action arises under the Dent Act (40 Stat. 1272). The alleged contract is informal and one growing out of the acts of the parties. As far back at least as 1908 the plaintiff has been furnishing telephone service to the departments of the Government and the District government. The character of service furnished the War Department was and is what is technically termed "a private branch-exchange switchboard service." This service imposes the necessity of the telephone company installing a private branch-exchange switchboard in quarters furnished by the Department, through the mediumship of

which calls to the various rooms and branches are immediately available without the necessity of going through the main central-office switchboard. Concededly such a service conserves time and affords convenience. In 1908 the plaintiff installed in the War Department the usual, customary, and well-known #4 private branch-exchange switchboard. The board had a capacity of 280 lines, and when put in service 180 of the 280 were utilized.

In the annual legislative, executive, and judicial appropriation bill, approved June 17, 1910 (36 Stat. 468-531), the Congress provided for a general supply committee and centered the authority in the Secretary of the Treasury to contract for the furnishing of supplies for all the executive departments. Telephone service was expressly included in the act. Following the enactment of this legislation the plaintiff, so far as material here, entered into written contracts with the Secretary of the Treasury for the furnishing of telephone service to all the executive departments of the Government and the District government. These annual contracts were dated, respectively, June 23, 1916, May 18, 1917, and September 25, 1918, all known as [fol. 22] general supply contracts. The determinative provisions and terms thereof appear in Findings III and IV. It is to be first noted that under the rates fixed by the Public Utilities Commission the plaintiff could do no more than contract to furnish the service at the established and approved rates of the commission. The commission did recognize the possibility of the company being required to furnish a type of equipment at an extra cost of installation, and to meet such emergencies authorized the company to contract for and charge the expense incident thereto. The provisions with respect thereto are set forth at the close of Finding V. There was also in each contract an express provision that the company would furnish additional service and equipment at the rates stated in the same.

The plaintiff observed every obligation imposed under the general supply contracts; it performed its covenants under adverse conditions, and in the midst of increases in the service that taxed its physical resources and finally developed a situation which, I believe, rendered it impossible to proceed under the supply contracts, and the War Department was as fully aware of existing conditions as the plain-

tiff. The happening of events, following closely upon each other, beginning with the Government's Mexican-border troubles, the unrestricted submarine warfare of Germany, and culminating with our entrance into and prosecution of the World War, so signally expanded the necessities of the War Department for telephone service that after exhausting every possible effort to meet the situation the plaintiff was in the end forced to do the special, unusual, and decidedly expensive thing of installing a central-office type of switchboard to meet the emergency and furnish the indispensable service. The telephone requirements of the War Department grew with rapid extensions from a required service of 257 telephones in January, 1917, to more than 6,000 in 1918, and it was manifest to all concerned that an increase of from 8,000 to 10,000 was to be anticipated. The activities of the War Department itself expanded during this period to the occupancy of sixty-five different buildings in the District of Columbia alone, not including other outside activities with which the department was in almost constant communication. The plaintiff, to meet this unusual demand for service, provided thousands of miles of additional wiring, supplied innumerable telephones, and incurred the unusual expense of furnishing a special type of switchboard known as #604, all without additional expense to the department, the plaintiff accepting without complaint up to this point the munificent compensation of $24 per annum for the use of its switchboard.

The situation having thus become acute, both parties realizing that the limit of service under existing conditions had been attained, and the War Department being no longer able to furnish quarters for the installation of additional or the enlargement of existing switchboards, the department decided upon the erection of a separate building to accommodate the installation of a switchboard and afford the plaintiff sufficient space to install the same, together with necessary incidental equipment to furnish the required telephone service. In a conference with the authorized officials of the department, one of the conferees being a specially appointed and deputized officer in charge of supervision over the telephone service, the plaintiff presented its plans [fol. 23] for the installation in the new building of a central-office type of switchboard. The plaintiff furnished to the

Secretary of War, and by him transmitted to the proper officials, a complete set of blueprints and specifications for the erection of the new building, disclosing in detail the necessities for space and indicating clearly the type of switchboard it was going to install. This is not all; the plaintiff's superintendent told the chief clerk of the department precisely what was to be done, and that the company was to be paid the cost thereof. The record sustains this fact, not alone from the testimony of the superintendent but corroborated by the chief clerk himself. True, the chief clerk made no reply to the superintendent, but nowhere in the record does the chief clerk assert a disavowal of responsibility for payment or a lack of knowledge with respect to the fact that plaintiff was proceeding with the expectation of being reimbursed for this unusual expense, and this fact is found in the closing paragraph of Finding XIII.

Following the preliminary negotiations the War Department did erect, at a cost of at least $130,000, a new and separate building at 1723 F Street N. W. This building, completed in record time, was so designed as to accommodate a central-office type of switchboard and all the necessary equipment. Within the building the plaintiff most expeditiously installed a central-office type of switchboard at an admitted cost of $401,113.34, a telephone exchange sufficient in capacity to furnish telephone service to a city of 100,000 inhabitants, a switchboard that required almost double the number of operators to operate, and a board for which the plaintiff had absolutely no use except for this especial purpose. It possessed no value other than salvage to the plaintiff. After the war was over and the necessities of the department declined to normal and the property of the plaintiff had been returned to it, subsequent to the period of Federal control, the plaintiff sold this switchboard for a net sum of $206,315.79. For the rental of the switchboard and equipment during the period of Federal control, the plaintiff received from the Government $11,202.20, and there was paid the plaintiff a depreciation allowance upon the switchboard and equipment by the Government of $22,232.78; deducting the sum of these items from the cost of the board leaves the balance of $161,362.57, for which amount judgment is asked.

The Dent Act (40 Stat. 1272) was a congressional recognition of contracts which had "not been executed in the manner prescribed by law." In according vitality to informal agreements the Congress intended to and did expressly extend the remedy to agreements expressed or implied. The decision of the Supreme Court in the Baltimore and Ohio Railroad case, 261 U. S. 592, 596, in construing the statute held that a contract, express or implied, must not only be established but the authority to make the contract upon the part of the Government must likewise be proved. The plaintiff's case is dependent upon these two distinct issues. If we abstract from this record the written contracts, i. e., the general supply contracts, it is seemingly apparent that an implied contract to pay the amount claimed exists. Due to the situation confronting the parties at the time, the department resolved to erect a separate building and the plaintiff was compelled to supply an unusual and expensive switchboard of a special type. This [fol. 24] would of itself, in the absence of other facts, warrant an inference that the plaintiff was furnishing equipment under circumstances of expecting pay therefor, and the department accepted the same under the same impression, for it would be indeed unusual for a person or corporation, after having exhausted all its physical resources to perform a given service and expended a large sum for work, labor, and materials to that end, to voluntarily enter upon a distinct character of service involving a great expense without the thought of reimbursement, especially so when the prevailing condition is one of war emergency, and the source of remuneration for the additional outlay is subject to indefinite and permanent extinction. The defendant puts forth no argument in opposition to this contention of the plaintiff.

Among the various defenses interposed, two relied upon with much confidence are predicated upon an assertion that under the record the plaintiff was obligated to furnish the service under the supply contracts, and if not so it does not appear that any officer of the Government having authority to make contracts did make the contract relied upon. The scope of contractual obligations may be ascertained from what the contract itself indicates as the intention of the parties in making the agreement. In other words, taking

into consideration the subject matter of the contract, and the terms used therein, what did the parties contemplate as to the beginning of the service and the limits to which one or the other may go in exacting performance of the same? As much better expressed in the case of Canal Co. v. Hill, 15 Wall. 94, 99: "* * * we should look carefully to the substance of the original agreement * * * as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements." The general supply contracts covered a telephone service for all the executive departments of the Government and the District government. They were the formal, usual, and customary contracts executed under the general supply statute securing to the Government the customary telephone service. In each there was a provision anticipatory in character, i. e., a covenant which obligated the plaintiff to meet normal increases and a corresponding covenant to decrease the service and reduce the compensation to be paid if future conditions so warranted.

There is no provision in the contracts even remotely suggesting that the contracts were designed to cover the development of a condition due to a war, or that the parties thereto contemplated the extraordinary and pronounced expansion of the service which subsequently occurred. Surely a contention that the supply contracts exacted the furnishing of a switchboard of the size and cost furnished the War Department to each and all the executive departments mentioned in the supply contracts would be untenable. It is obvious that such a burden was never intended by the parties to be assumed without remuneration. The very insignificance of the compensation to be paid for a private branch-exchange switchboard, to wit, $24 per annum, clearly indicates what the parties contemplated. It is true one of the supply contracts was executed when war was flagrant and the service on the increase, but it is equally true that the plaintiff performed without extra expense, [fol. 25] except as the contract provided, what it agreed to do under these contracts until conditions rendered the impossibility of further performance. While the character of the service remained the same, and the subject matter of the contracts did not change, it has been held by the

courts that performance of additional service not within the contemplation of the parties when the contract was made, a service so vast in extent and so manifestly disproportionate as to characterize it as one distinct from the contract, may not be imposed upon a contractor without paying therefor. United States v. Stage Co., 199 U. S. 414; O'Brien v. Miller, 168 U. S. 287.

The determinative issue with respect to a contract to reimburse is seemingly confined more to the question of authority to make rather than the existence of an implied contract. Every responsible and authorized officer of the department was advised and fully cognizant of the emergency situation and the absolute inadequacy of the installed equipment to meet the situation. Cooperation between the plaintiff and the officers existed. The vast extent of the changes necessary was assented to. Those in authority authorized the new building and cannot escape express notice of the exact character of the switchboard to be erected therein. Mr. Scovell, in charge of the entire telephone service for the department under an appointment the legality of which is not questioned, concedes a contract to pay the cost of the board. The chief clerk, whose authority to contract is conceded, admits that the superintendent of the company said to him as follows:

"Do you remember anything being said to you by any officials of the telephone company about payment for the new switchboard? Do you have any specific recollection of anything being said to you?"

to which he replied:

"I have a recollection that Mr. Claggett spoke to me, as I say, after the building was completed, or when it was substantially completed. He did not put it in the form of a letter, just mentioned it. He said: 'You know, we will have to ask you to pay for this,' or something like that—'we will have to bill you for this,' or some remark of that kind, but nothing in the nature of a formal demand."

and further:

"What did you say in response?" "I do not remember that I said anything. I do not know what I said."

It is true the chief clerk further testified that he did not indicate to the superintendent that he intended to pay the bill, but what is of more significance he did not indicate to him that he did not intend to pay the bill. Silence, when one is obligated to speak, not infrequently carries with it a greater degree of responsibility than spoken words. Two pertinent inferences are deducible from this testimony. First, the chief clerk knew the plaintiff was not doing this extra work for nothing. Second, no protest was lodged against the claim and no indication of a lack of assent to it. It is no criticism of the chief clerk and no challenge of his good faith throughout the transaction to emphasize the fact that under the law, where one in authority stands by with knowledge of a claim for pay for services and permits the performance of said services without a protest, he may not claim all the benefits thereof and disavow the responsibility to pay. This, I think, is axiomatic, and applies with added [fol. 26] force when one party is indispenably in need of the service and the other party is insisting that no express contract exists extracting it. It has been long since adjudicated that a Government contract is subject to the same rules of construction as a contract between private individuals.

Keeping in mind that the case involves an implied and not an express contract, it is difficult to escape a conclusion that the plaintiff did all it was required to do under the circumstances to establish its right to reimbursement. The Dent Act, it seems to me, was intended to afford relief in this identical class of cases. Swift & Co. v. United States, 270 U. S. 124. The acute situation as to telephone service in the department is reflected in the appointment of Mr. Scovell and placing in his charge the telephone service. Scovell during his incumbency had purchased telephone supplies "without any written order," and the department paid them without question. He had also given orders for work and installations extra in character to the plaintiff company; that is, oral orders, and payment had been made without question. It is conceded that Scovell was there to get the best and most expeditious service possible and that the "Secretary of War supported him in that." Nowhere in the record is it disputed that Scovell had direct charge of the telephone service and that the plaintiff dealt directly with him as occasion demanded. Scovell, an expert in his

line, knew more about and came more directly in contact with the service than any or all the officers concerned. He and he alone was the actual participant put forward by the department to deal with the plaintiff. He reported directly to the Secretary of War, and so far as this record discloses this transaction is the single one where Scovell's authority to act has been questioned. The findings recite (Finding XII) that he had no contractual authority and then proceed to recite that he did without written orders from the Secretary of War or the chief clerk order this plaintiff to do extra work and make extra installations, for all of which the department authorized payments to be made.

It is not always difficult to spell out of a situation after the fact that no proclamation of express authority was ever issued to a certain official to act, when as a matter of fact during the confusion and pressure of an illimitable emergency, an emergency so great that the Secretary of War was under the tremendous burden of expending, as he says, "a million of dollars every hour of the day and night, and every day in the week, including Sunday," no one questioned the authority of the official, and what he did in the discharge of his duties was approved without question. Swift case, supra. Scovell had some definite place in the organization, and if he was charged with the duty of procuring the best telephone service "as quickly as possible" surely it is no violent presumption that along with his assignment went complete authority to accomplish what he was charged with doing.

The authority of the chief clerk to contract is conceded, as previously observed; no one challenges his right so to do, and while the findings are replete with positive statements of lack of authority upon the part of Scovell, it is one thing to find as an ultimate fact lack of authority, and quite another to deduce from words and conduct the relationship obtaining between the parties to a transaction. It is difficult to conceive a right to hold one out to the public with au- [fol. 27] thority to act, ratify a number of acts involving authority to thus act, and then after a transaction has passed to the point of execution and all the benefits of the same have been accepted and enjoyed, disavow responsibility to pay therefor. In the amendments made to the original findings nothing in the view of this opinion materially affects the status of the case. The amendment to Finding

XII serves only to emphasize what was previously found, and the amendment to Finding XIII clearly indicates that the representatives of the telephone company expected pay, and at least one of its officials was unwilling, until ordered by his superior officer, to proceed without an express contract to pay. Surrounding the whole case, conceding arguendo that the findings are in all respects accurate, there exists, it seems to me, a clear, irrefutable inference and understanding that what the plaintiff was called upon to do was most extraordinary, unusual, and not within the customary and established course of dealing between the parties during all previous years. The defendant was fully aware of this fact, and it is difficult to conclude that under all the circumstances of the case the defendant expected to receive the service rendered without paying therefor.

Finding XVI, if relied upon as a defense, is, it seems to me, available to sustain the plaintiff's contention. The item of cost paid for removal of the exchange from the War Department to the new and separate building was paid under a conceded liability for equipment not provided for in the supply contracts. It is the switchboard not provided for in the supply contracts that is involved in this case, and it is the cost of same for which recovery is claimed, under an implied contract to reimburse. As a matter of fact, the payment of cost of removal of lines, wires, and various incidental materials, including labor involved, seems to be remotely connected with an alleged contract to pay for the switchboard involved. Cost of removal and furnishing a central-office type of switchboard are two distinct items.

A defense made in defendant's brief, insisted upon in the argument and covered by Findings XXI, XXII, and XXIII, is predicated upon an alleged reimbursement of the plaintiff by the American Telephone and Telegraph Company of the loss sustained by the plaintiff in installing the switchboard in suit. The opinion of the court contains no comment respecting the insistence. It is difficult to perceive what place the facts have in the record. This is not a suit for damages. It is for the recovery of compensation under an implied contract for materials furnished, and in the absence of any discussion of the issue, in the opinion of the court, the defense was obviously regarded as untenable.

Strange as it may seem, the defendant requested Findings XXIV and XXV. In these findings facts are recited

disclosing a vast increase in revenue to the plaintiff company, while in the preceding findings the fact is found that notwithstanding these vast increases the plaintiff company in its anxiety to serve the Government during the war actually lost in furnishing extra equipment, etc., at least $1,250,000. The pertinency of these findings, as well as those with reference to the matter of Federal control, is to me obscure. It would be a most remarkable state of facts if at the end of the services rendered in this case the revenue therefrom should have remained at the same total sums as in the beginning. What all this has to do with the cost [fol. 28] of installing a central-office type of switchboard can assuredly have no greater significance than the basis for an inference that the plaintiff was alone concerned in installing this extra type switchboard for the increased profits which would accrue. Such an inference fails in view of Finding XXI.

This case being now before the court on the plaintiff's motion to amend the findings and for a new trial, I dissent from the judgment of the court in overruling the motion. I think the motion should be allowed, and that the findings should be amended in certain particulars as pointed out by the plaintiff and sustained by the record. The motion for a new trial should be allowed, and judgment awarded the plaintiff for the amount claimed in the petition.

Moss, Judge, concurring.

[fol. 29] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 10th day of June, A. D., 1929, judgment was ordered to be entered as follows:

Upon the amended special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and that its petition should be and it is hereby, dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the Clerk and collected by him according to law, the amount of which is found to be $1,129.97.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,520. Court of Claims. Term No. 389. The Chesapeake & Potomac Telephone Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed September 10, 1929. File No. 34,520.

(9412)